TONY PUA KIAM WEE v. DATO' SRI MOHD NAJIB TUN HJ ABDUL RAZAK

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
ZALEHA YUSOF JCA
YAACOB MD SAM JCA
[CIVIL APPEAL NO: W-02(IM)-1650-08-2017]
22 FEBRUARY 2018

TORT: *Defamation – Libel – Video recording published in Facebook account – Application for interim injunction allowed by High Court – Whether defences of justification, fair comment and absolute privilege applicable – Whether High Court Judge erred in allowing interim injunction – Whether plaintiff bore burden to prove that defendant's defences would not succeed – Whether High Court Judge erred in shifting burden on defendant – Whether judicial notice ought to be taken – Whether further formal proof required*

In the court below, the respondent ('plaintiff') instituted a civil action for defamation against the appellant ('defendant') for his statement made on 6 April 2017 who had later caused it to be published *vide* a live video in his Facebook account. The said video was alleged to be false and/or malicious and defamatory of the plaintiff. The plaintiff then filed an application for an interim injunction under O. 29 r. 1 of the Rules of Courts 2012 to restrain, *inter alia*, the defendant from communicating, and/or causing to be published statements which are defamatory of the plaintiff. It was the contention of the plaintiff that the innuendo meaning of the statements meant and was understood to mean that the plaintiff had been involved in collusion with PAS on the tabling of the motion of RUU355 or had stolen money from 1MDB. The defendant in his defence raised the defence of justification, fair comment and qualified privilege. The High Court Judge ('HCJ') allowed the plaintiff's application. Hence, the present appeal. It was the defendant's submission, *inter alia*, that (i) an interlocutory injunction would not be granted against the defendant who had raised a recognised defence, thus, it was contended that it was for the plaintiff to show that there was no defence to the claim for defamation that was instituted against the defendant; and (ii) in an interlocutory injunction application of this nature, it was the plaintiff who bore the burden of proving that the defendant's defences would not succeed or that the impugned words were obliviously untrue. By shifting the burden on the defendant, it was argued that the HCJ had erred in law and therefore, warranting appellate intervention. On the other hand, the plaintiff urged the court to take judicial notice of the fact that there was no truth in the allegation that there was wrong doing on the part of the plaintiff in relation to the 1MDB fiasco as the plaintiff had been cleared of any wrong doing by the Attorney General.

Held (dismissing appeal)
Per Yaacob Md Sam JCA delivering the judgment of the court:

(1) It is trite that in applications for an interim injunction in defamation cases, the burden lies on the plaintiff to demonstrate that the defendant's defences were bound to fail or that the statements were obviously untrue. (para 22)

(2) There was no evidence to support the defendant's defences. The defendant's allegation on the issue of collusion between the plaintiff, Barisan Nasional and PAS in RUU355 was merely an assumption. The standing order of the Dewan Rakyat under Order 49(2) provides that any private member desiring to introduce a Bill may apply to the House for leave to do so. It was entirely the sole power and discretion of the Speaker of Dewan Rakyat to regulate on the acceptance and business of the House whether to allow or not any private member's Bill. The defendant, being a Member of Parliament, ought to know and must be familiar with such standing orders. (para 24)

(3) The essence of judicial notice is that there is a dispensation of the otherwise requirement for proof to be adduced in court to establish an asserted factual circumstance. On the facts of this case, the findings of, amongst other, the Attorney General were reported widely and the fact that they were in the public domain could never be disputed. The fact that such findings were, therefore, notorious also could not be entertained as a serious contention. Thus, judicial notice ought to be taken of the fact that the Attorney General of Malaysia had made a decision that the plaintiff had done no wrong in relation to the 1MDB issue. Such final decision was within the framework of art. 145 of the Federal Constitution. To require any further formal proof would be entirely inimical. (paras 27 & 37)

(4) The plaintiff had succeeded in discharging the burden required of him in order to be granted the interim injunction. The fact that the plaintiff had stated that there were triable issues did not invite any adverse comment as, on the context of a defamation suit, there were obvious disputable facts that were suitably posed for full ventilation on an *viva voce* hearing with witnesses examined for veracity. (paras 38)

(5) The court ought to be very cautious in granting interim injunction to restrain publication of an alleged defamatory statement. However, there is no total bar from granting an interim injunction in a defamation case. On the facts, this was a proper case where such application for interim injunction should be granted. The HCJ had not erred on the facts and in law in exercising the court's discretion in favour of allowing an injunction against the defendant. The reason being that the defences set

up by the defendant could not, in light of the evidence, especially the Attorney-General's decision, succeed. There was, therefore, no merits in the present appeal.

***Bahasa Malaysia** Headnotes*

Dalam mahkamah di bawah, responden ('plaintif') memulakan tindakan sivil kerana memfitnah terhadap perayu ('tertuduh') untuk penyataannya yang dibuat pada 6 April 2017 yang kemudiannya menyebabkannya diterbitkan melalui video langsung dalam akaun Facebook miliknya. Video tersebut dikatakan palsu dan/atau berniat jahat dan memfitnah plaintif. Plaintif kemudiannya memfailkan permohonan untuk injunksi interim bawah A. 29 k. 1 Kaedah-Kaedah Mahkamah 2012 untuk menghalang, antara lain, defendan daripada berkomunikasi, dan/atau menyebabkan penerbitan kenyataan yang memfitnah plaintif. Plaintif menghujahkan bahawa makna perkataan yang dimaksudkan dan difahami adalah bahawa plaintif terlibat dalam kolusi dengan PAS atas pembentangan usul RUU355 atau telah mencuri wang daripada 1MDB. Defendan dalam pembelaannya membangkitkan pembelaan justifikasi, komen berpatutan dan perlindungan bersyarat. Hakim Mahkamah Tinggi ('HMT') membenarkan permohonan plaintif. Oleh itu, rayuan ini. Defendan menghujahkan, antara lain, bahawa (i) injunksi interlokutori tidak akan diberikan kepada defendan yang telah membangkitkan pembelaan yang diiktiraf, oleh itu, adalah ditegaskan bahawa beban adalah pada plaintif untuk menunjukkan bahawa tiada pembelaan bagi tuntutan fitnah yang dimulakan terhadap defendan; dan (ii) dalam injunksi interlokutori sebegini, plaintif yang memikul beban untuk membuktikan bahawa pembelaan defendan tidak akan berjaya atau bahawa kata-kata yang memfitnah itu tidak benar. Dengan memindahkan beban kepada defendan, dihujahkan bahawa HMT telah terkhilaf dari segi undang-undang dan oleh itu, campur tangan rayuan adalah wajar. Sebaliknya, plaintif menggesa mahkamah untuk mengambil notis kehakiman tentang fakta bahawa tidak ada bukti mengenai dakwaan terdapat salah laku oleh pihak plaintif berhubung dengan 1MDB kerana plaintif telah dibersihkan dari sebarang salah laku oleh Peguam Negara.

Diputuskan (menolak rayuan)
Oleh Yaacob Md Sam HMR menyampaikan penghakiman mahkamah:

(1) Adalah mantap bahawa dalam permohonan injunksi interim dalam kes-kes fitnah, beban terletak pada plaintif untuk menunjukkan bahawa pembelaan defendan akan gagal atau bahawa kenyataan-kenyataan tersebut jelas tidak benar.

(2) Tiada bukti untuk menyokong pembelaan defendan. Dakwaan defendan mengenai masalah kolusi antara plaintif, Barisan Nasional dan PAS dalam RUU355 hanyalah suatu anggapan. Perintah tetap Dewan Rakyat di bawah Perintah 49(2) memperuntukkan bahawa mana-mana ahli

A persendirian yang berhasrat memperkenalkan Rang Undang-undang boleh memohon kepada Dewan untuk berbuat demikian. Adalah kuasa dan pilihan Ketua Dewan Rakyat untuk mengawal selia penerimaan dan perjalanan Dewan sama ada untuk membenarkan atau tidak apa-apa Rang Undang-Undang Ahli Persendirian. Defendan sebagai seorang Ahli B Parlimen, harus mengetahui dan biasa dengan perintah tetap tersebut.

(3) Inti pati notis kehakiman adalah terdapat suatu ketidakperluan untuk pembuktian diajukan di mahkamah untuk membuktikan sesuatu fakta. Dalam kes ini, penemuan, antara lain, Peguam Negara dilaporkan secara meluas dan fakta bahawa laporan ini berada dalam domain awam tidak C boleh dipertikaikan. Fakta bahawa penemuan sedemikian itu diketahui juga tidak dapat dilayan sebagai perbalahan yang serius. Oleh itu, notis kehakiman sepatutnya diambil tentang fakta Peguam Negara telah membuat keputusan bahawa plaintif tidak melakukan salah laku berhubung dengan isu 1MDB. Keputusan akhir tersebut adalah dalam D rangka kerja per. 145 Perlembagaan Persekutuan. Keperluan apa-apa bukti formal lanjut adalah memudaratkan.

(4) Plaintif telah berjaya melepaskan beban yang diperlukan olehnya untuk diberikan injunksi interim. Fakta bahawa plaintif telah menyatakan bahawa terdapat isu-isu yang boleh dibicarakan tidak menarik apa-apa E komen buruk dalam konteks guaman fitnah, terdapat fakta-fakta yang jelas boleh dipertikaikan melalui hujahan lanjut dalam perbicaraan *viva voce* dengan saksi diperiksa untuk kebenaran.

(5) Mahkamah harus berhati-hati dalam memberikan injunksi interim untuk menghalang penyiaran sesuatu kenyataan yang dikatakan memfitnah. F Walau bagaimanapun, tiada sebarang sekatan sepenuhnya dari membenarkan pemberian injunksi interim dalam kes fitnah. Berdasarkan fakta, ini adalah kes yang betul di mana permohonan untuk injunksi interim patut diberikan. HMT tidak terkhilaf dari segi undang-undang dan fakta menjalankan budi bicara mahkamah dalam membenarkan G injunksi terhadap defendan. Ini adalah kerana pembelaan yang dikemukakan oleh defendan, berdasarkan bukti, terutama keputusan Peguam Negara, tidak boleh berjaya. Oleh itu, tiada merit dalam rayuan ini.

Case(s) referred to:

H *Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor [2014] 3 CLJ 560 CA* ***(refd)***

Dato' Seri S Samy Vellu v. Penerbitan Sahabat (M) Sdn Bhd & Anor [2005] 1 LNS 290 HC ***(refd)***

Jameel v. Wall Street Journal [2006] 4 All ER 1279 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(refd)***

I *Lee Chow Meng v. PP [1975] 1 LNS 199* ***(refd)***

Ngoi Thiam Woh v. CTOS Sdn Bhd & Ors [2001] 4 CLJ 765 HC ***(refd)***

Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd [1985] 1 LNS 122 SC ***(refd)***
Santhi Krishnan v. Malaysia Building Society Bhd [2015] 1 CLJ 1099 CA ***(refd)***
The New Straits Times Press (M) Bhd. v. AirAsia Bhd [1986] 1 LNS 80 SC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 56, 57(1)(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o)
Federal Constitution, art. 145
Rules of Court 2012, O. 29 r. 1, O. 49 r. 2

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[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: WA-23CY-17-04-2017 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Yaacob Md Sam JCA:

Introduction

[1] This appeal arises as a consequence of the decision of the High Court to grant an interim injunction against the appellant, pending the disposal of an action in libel and/slander brought by the respondent/plaintiff against the appellant/defendant. We will refer the parties as they appeared before the High Court Judge.

Brief Facts Of The Case

[2] The pertinent background facts are as follows. Dato' Sri Mohd Najib bin Tun Haji Abdul Razak ("the plaintiff"), is the Prime Minister of Malaysia, Minister of Finance, Chairman of Barisan Nasional ("BN") and President of United Malays National Organisation ("UMNO").

[3] Tony Pua Kiam Wee ("the defendant") is Nasional Publicity Secretary for the Democratic Action Party ("DAP") and also the Member of Parliament for constituency of Petaling Jaya Utara, Selangor.

[4] In the court below, the plaintiff had instituted a civil action for defamation against the defendant for his statement made on 6 April 2017 at the foyer of the Parliament Building, who had later caused it to be published in his Facebook account. The 2 minutes and 21 seconds' duration of live video was uploaded at https://www.facebook.com/MPTonyPua?fref=ts entitled "BN Govt abandons all Bills to give precedence to PAS RUU355 Private Member's Bills" under the caption "After debating a new Tourism

A tax bill which was passed by the BN MPs at 5am this morning, the Govt abandoned 5 other key bills which were tabled for debate. This is purely to allow for PAS President Dato' Seri Hadi Awang to table his private member's bill to amend RUU355 Syariah Courts (Criminal Jurisdiction) Act. Opposition motions and bills have never made it to the House Floor for B debate in the history of Malaysian Parliament, because BN controls what gets tabled, in collusion with the House Speaker. The question then must be taken, why did BN – that's UMNO, MCA, MIC, Gerakan and the Sabah-Sarawak parties – bend over backwards to give precedence to the PAS private member's Bill? What more, PAS only has 14 MPs in the House, out of 222 in total – compared to Pakatan Harapan with more than 70 MPs – C why is BN making PAS so "powerful"? It is clear that UMNO is allowing the PAS motion for political reasons to divide the opposition support, while MCA, Gerakan, MIC and other BN component parties are mere self-serving eunuchs in BN's decision-making process."(Referred to as "the said live video").

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[5] The said live video also contained the following words which the plaintiff claims to be false and/or malicious and defamatory of the plaintiff, ie:

> ... there will be no more debates on any other laws on Parliament until E August this year. So for the next five months, there will be no new bills passed, and all these five important bills, Government Bills, are actually postponed, just for what? Just to allow Marang to table the Private Members Bill. So this question must be answered by the Prime Minister, must be answered by the component parties of Barisan Nasional. There is no point saying that the Government is not tabling the Bill, when they F actually grant precedence under the instructions of the Cabinet to allow for PAS with only 14 MPs in the Parliament. 14 out of 222 given the right to table this Bill. Even DAP has more MPs, we have 38 MPs .. 36 today, then ... aaa ... PKR has 30 ... 28 MPs. All of us have more MPs in the House, we are not allowed to table our Private Member's Bill or Motions, but PAS with only 14 MPs, is allowed to table their Bills. So there is a G clear cut collusion between Dato' Sri Najib Razak, between BN and PAS, with the political intent of splitting the Malay vote among the opposition and with the political intent to keep hanging onto power despite the fact that he is the most unpopular Prime Minister in the history of Malaysia. And we can see that the entire hoohaa ... brouhaha ... was actually designed as a political scheme to distract Malaysian from the crime that H the Prime Minister has committed mainly the fact that the Prime Minister has stolen billions of Ringgit from 1MDB, a wholly own subsidiary of the Government of Malaysia. So we must not fall into the trap put forward by the Prime Minister in collusion with PAS. Malaysia must hold firmly strong. We will, on the part of DAP, reject the Private Member's Bill brought forwards by Marang, but the bigger agenda, the woods that we I should not lose sight of is to bring down a kleptocratic administration led by the biggest thief of all the country, Dato' Sri Najib Razak."(referred to as "the said impugned words").

[6] The plaintiff then filed an application for an interim injunction under O. 29 r. 1 of the Rules of Court 2012 for an interim injunction restraining the defendant and/or his agent and/or his servants and/or otherwise whosoever communicating, commenting and/or causing to be published statements of words which are defamatory of the plaintiff.

[7] It is the contention of the plaintiff that the innuendo meaning of the statements meant and was understood to mean that the plaintiff has been involved in collusion with PAS on the tabling of the motion of RUU355 or had stolen money from 1MDB. The statements attacked the plaintiff's moral character and portrayed the plaintiff as dishonest, ineligible to be a leader of the country, not qualified as a political leader, not fit to be a Prime Minister and a tyrannical leader who could not be trusted with the people's money. It was also claimed that the statements have exposed the plaintiff to hatred, ridicule and contempt in the mind of a reasonable viewer and would also lower the plaintiff in the estimation of right-thinking members of society, generally. The plaintiff claimed that the effect in publication *via* internet has a multiplying effect as it was viewed, downloaded and shared/circulated to others not only within the country but also the whole world outside.

[8] As it had come to pass, the posting went viral. As at 10 April 2017, the date before the serving of a letter of demand by the plaintiff on the defendant, the video recording has been viewed 82,434 times on the defendant's Facebook page. The defendant has 310,256 users following his Facebook page.

[9] The defendant, in his defence *inter alia*, raised defence of justification, fair comment and qualified privilege. In his affidavit-in-reply to the plaintiff's application, the defendant averred that he has an honest and absolute belief that the impugned words are true and supported by substantial particulars and will prove this at the trial. It was also the defendant's contention that the impugned statements were not capable of the defamatory meanings assigned to them by the plaintiff.

Decision Of The High Court

[10] The High Court Judge had on 4 August 2017 allowed the plaintiff's interim injunction.

[11] The relevant passages in the judgment of the learned judge's in allowing the plaintiff's application is as follows (pp. 5-7 rekod rayuan tambahan (1)1:

> [12] Saya telah mengkaji pliding di dalam kes ini dan affidavit-affidavit yang difailkan. Defendant tidak menafikan mengeluarkan pengataan-pengataan tersebut dan telah memuatnaik ke akaun facebook beliau. Pada tahap ini saya berpuas hati bahawa pengataan-pengataan yang dibuat oleh Defendant tersebut bersifat fitnah secara innuendo (sindiran)

membayangkan Plaintif bersama-sama Barisan Nasional dan PAS telah membuat pakatan jahat (collusion) bagi membolehkan PAS membuat pembentangan Rang Undang-Undang 355 di Parlimen walaupun PAS mempunyal jumlah kerusi yang kurang di Parlimen berbanding dengan DAP yang tidak dibenarkan mengemukakan Rang Undang-Undang Persendirian yang mereka cadangkan. Pengataan yang dibuat Defendant juga secara sindiran mengatakan Plaintif telah mencuri wang dari 1MDB. Berdasarkan penelitian saya ke atas pengataan-pengataan Defendan di dalam affidavit jawapan mereka saya dapati tidak ada asas untuk membuat konklusi bahawa pengataan tersebut mungkin benar.

[13] Selanjutnya saya juga meneliti pembelaan yang ditimbulkan oleh Defendan di dalam penyata pembelaan mereka dan pengataan-pengataan Defendan di dalam affidavit menentang permohonan ini. Saya dapati pada tahap ini, berasaskan penegasan-penegasan di dalam affidavit, pembelaan-pembelaan yang ditimbulkan di dalam pembelaan Defendan adalah persepsi mereka tentang apa yang berlaku dan tidak ada keterangan yang jitu dikemukakan melalui affidavit yang menunjukkan akan berjaya di dalam pembelaan yang ditimbulkan.

[14] Selanjutnya saya pertimbangkan keadaan sama ada kemungkinan Defendan akan mengulangi pengataan-pengataan yang bersifat fitnah mereka terhadap Plaintif. Terdapat keterangan yang menunjukkan Defendan terlibat di dalam beberapa tuntutan fitnah yang dimulakan oleh Plaintif di dalam beberapa kes sebelum dan selepas ini dan asas tuntutan fitnah tersebut juga berdasarkan isu 1MDB. Defendan juga telah diserahkan dengan surat tuntutan yang mengandungi gesaan untuk Defendan untuk memberi jaminan dia tidak akan mengulangi pengataan-pengataan sedemikian tetapi Defendan tidak memberi sebarang jawapan kepada surat tuntutan tersebut. Berasaskan keadaan-keadaan tersebut saya berpuashati Defendan sememangnya berniat untuk terus mengeluarkan kata-kata yang bersifat fitnah terhadap Plaintif jika tidak ada injunksi diberikan.

[12] Primarily, based on the pleadings and affidavits, the learned judge was of the view that the plaintiff has satisfied the following factors/requirements:

(a) that the statement is unarguably defamatory (para 12);

(b) there are no grounds for concluding that the statement may be true (para 12);

(c) there is no other defence which may succeed (para 13);

(d) there is evidence of an intention to repeat or publish the defamatory statement (para 14).

[13] On this decision, the defendant had since filed this appeal before us. The appeal was heard on 26 January 2018. We, nevertheless had reserved our judgment for further deliberation. We now deliver our decision and proffer our grounds having so decided.

The Competing Contentions

[14] The crux of this appeal turns on the laws governing for an interim injunction in respect of defamation cases. Learned counsel for the defendant submitted that the learned High Court Judge had applied the wrong test for an interim injunction in a defamation suit, which differs from the law pertaining to typical interlocutory injunctions. It was contended that an interlocutory injunction will not be granted against the defendant who has raised a recognised defence, that is the defences of justification, privilege and fair comment. Thus, it was contended that it was for the plaintiff to show that there was no defence to the claim for defamation that was instituted against the defendant. It was further submitted that in an interlocutory injunction application of this nature, it is the plaintiff who bears the burden of proving that the defendant's defences will not succeed or that the impugned words were obviously untrue. The defendant further contended that the plaintiff has failed to demonstrate or adduce any evidence to prove that the impugned words were obviously untrue or that the other defences raised by the defendant were bound to fail. It was submitted before us that the learned High Court Judge had shifted that the burden onto the defendant's shoulders and in doing so, he had erred in law. On that premise, he submitted to us that such error had necessitated appellate intervention and had urged us to allow this appeal. While learned counsel for the defendant was frank enough to concede that there is no total ban or prohibition in granting interim injunction in a defamation suit, it is his submission that such granting in this case is not justified.

[15] Learned counsel for the plaintiff, on the other hand, submitted that the plaintiff has satisfied all factors to enable the learned judge to grant interlocutory injunction in favour of the plaintiff. It was further submitted that the plaintiff has discharged the burden of proving that the defendant's defences depend on mere perceptions, assumption and constitute hearsay evidence of which its validity is highly doubtful and are bound to fail.

Our Decision

[16] We have considered the submissions and authorities cited by both parties.

[17] In an application for a typical injunction, the plaintiff had to establish that there were *bona fide* serious issues to be tried, and that the balance of convenience laid in favour of granting the injunction (*Keet Gerald Francis Noel John v. Mohd Noor & Ors.* [1995] 1 CLJ 293).

[18] The principle to be adopted by the court in respect of an application for an order of interlocutory injunction in defamation case had been clearly spelt out in the Supreme Court case of *The New Straits Times Press (M) Bhd v. AirAsia Bhd.* [1986] 1 LNS 80; [1987] 1 MLJ 36, Abdul Hamid Ag. LP (as His Lordship then was) at p. 38 had held that:

A There is, in law, no doubt that "the High Court may grant an interlocutory injunction restraining the Defendant, whether by himself or by his servants or agents or otherwise, from publishing or further publishing matter which is defamatory or of malicious falsehood. It is not necessary to show that there has already been an actionable publication or the damage has been sustained. In appropriate cases an injunction may
B be granted *ex parte* and before the issue of writ. (*Halsbury's Law of England*, 4th Ed. Vol. 28 para 166).

...

Authorities do also show that the principle that there shall be no interim injunction if defence is raised "applies not only to the defence of
C justification" (*Bonnard v. Perryman*) (1891) 2 Ch. 269, "but also to the defence of privilege" (*Quartz Hill Consolidated Gold Mining v. Baell)* (1882) 20 Ch. D 501, and " fair comment" (*Frazer v. Evans & Ors*) [1969] 1 QB 349. In accordance with the long-established practice in defamation action, the principles enunciated by the House of Lords in *American Cyanamid v.*
D *Ethicon Ltd* [1975] A.C. 396 relating to interim injunctions are not applicable in action for defamation. (*Herbage v. Pressdram Ltd.* [1984] 1 WLR 1160, 1162.

[19] The learned Ag. Lord President further held (at p 39):

The principle has clearly emerged by reason of the fact that the questions
E of libel or no libel are eminently matters to be decided on facts at the trial and there is also the question of the proper meaning to be assigned to the words used in a particular statement. To restrain a Defendant before the questions are determined would amount to fettering with freedom of speech. Indeed, it is because of the importance of leaving free speech unfettered that the Court must be slow in issuing interim injunction in
F a libel action.

In applying these principles, value is placed by the Court upon the freedom of speech which is related to the freedom of the press when balancing it against the reputation of a single individual who, if wronged, can be adequately compensated in damages. The Court should act cautiously in
G granting interim injunction to restrain publication of an alleged defamatory statement. In fact it should not grant the injunction where the Defendant says he is going to justify it at the trial of the action except where the statement is obviously untruthful or where the Plaintiff has satisfied the Court that the Defence will fail.

H **[20]** In *Ngoi Thiam Woh v. CTOS Sdn Bhd & Ors* [2001] 4 CLJ 765; [2001] 4 MLJ 510, His Lordship Abdull Hamid Embong J (as he then was) had the occasion to re-affirm the legal position as set out in *The New Straits Times Press Bhd v. AirAsia (supra).* His Lordship at p. 772 (CLJ); p. 518 (MLJ) had held as follows:

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> The principle also shows that no interim injunction shall be granted if the defence is that of justification, fair comment or privilege ... In the instant case, the second and third defendants had also in their defence raised the plea of privilege, which, according to the principle so strongly advocated by our highest court, must seemingly be a bar to a free grant of an interim injunction, unless the statement is 'obviously untruthful.

[21] In *Dato' Seri S Samy Vellu v. Penerbitan Sahabat (M) Sdn Bhd & Anor* [2005] 1 LNS 290; [2005] 5 MLJ 561, His Lordship Abdul Malik Ishak J (as he then was) at p. 599 held that:

> ... The burden of proof must remain on the plaintiff to show that the statements are obviously untrue and that the defendants' plea of justification and qualified privilege are bound to fail.

[22] It is therefore trite that in such applications for an interim injunction in defamation cases, the burden lies on the plaintiff to demonstrate that the defendant's defences are bound to fail or that the statements are obviously untrue. There should be no finding in this appeal on the merits of the claim (see *The New Straits Times Press (M) Bhd (supra*)).

[23] Given that the sought interim injunction was granted, we gathered that the learned High Court Judge had applied the legal principles enunciated in *Gatley on Libel and Slander* (9th edn) and *The New Straits Times Press (M) Bhd v. AirAsia (supra)*. The alleged defamatory statements made by the defendant centred around two subjects, namely, (i) collusion between plaintiff, BN and PAS in RUU355; and (ii) the plaintiff has stolen monies from 1MDB. The most serious allegations in the impugned statement relate to 1MDB in which it was said that the plaintiff "has stolen billions of Ringgit from 1MDB" and "the biggest thief of all in the country, Dato' Sri Najib Razak."

[24] We agree with the judge that there was no evidence to support the defendant's defences. The defendant's allegation on the issue of collusion between the plaintiff, BN and PAS in RUU355 is merely an assumption. We note that the standing order of the Dewan Rakyat under O. 49 r. 2 provides that any private member desiring to introduce a Bill may apply to the House for leave to do so. It is entirely within the sole power and discretion of the Speaker of Dewan Rakyat to regulate on the acceptance and business of the House whether to allow or not any private member's Bill. The defendant as a Member of Parliament of some decent number of years ought to know and must be familiar with such standing orders of Dewan Rakyat.

[25] In the course of oral submissions before us, learned counsel for the plaintiff had urged this court to take judicial notice of the fact that there was no truth in the allegation that there was wrongdoing on the part of the plaintiff in relation to the so-called 1MDB fiasco, as he had been cleared of any wrongdoing by the Hon. Attorney-General and this fact were well-publicised both by the main as well as the alternative media and as such, it

was well within the public domain. It is in this context that this court was urged upon by learned counsel for the plaintiff that we ought to take judicial notice of that factual circumstance.

[26] Learned counsel for the defendant on the other hand, submitted that in order for the court to give judicial notice on the matters, the official copy of the press release or reports of the AGC or MACC that was made public ought to be exhibited by the plaintiff in his affidavit which has not been done by the plaintiff.

[27] On this issue of judicial notice, we are of the view that the essence of judicial notice is that there is a dispensation of the otherwise requirement for proof to be adduced in court to establish an asserted factual circumstance. Once a factual circumstance is taken judicial notice of, then the need for the asserting party to adduce evidence to show to the court that such a factual circumstance in fact existed is negated or exempted by operation of law. Once a fact is judicially noticed by the court, no proof needs to be adduced to prove its existence.

[28] Judicial notice is embedded in statute. It is statutorily recognised. Section 56 of the Evidence Act 1950, provides as follows:

> 56 Facts judicially noticeable need not be proved.
>
> No fact of which the court will take judicial notice need be proved.

[29] It is clear that this represents a major departure from the general rule in that every allegation of fact in issue and relevant fact must be proved by leading evidence. The other category of facts that does need not to be proved is the 'agreed facts.' This can be seen in the speech by Syed Agil Barakbah SCJ in the Federal Court decision in *Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd* [1985] 1 LNS 122; [1986] 2 MLJ 30, 31 where the learned justice said as follows:

> Now, the general rule is that all facts in issue and relevant facts must be proved by evidence. There are, however, two classes of facts which need not be proved, *viz*: (a) facts judicially noticed; and (b) facts admitted. The exceptions are dealt with by sections 56, 57 and 58 of the Evidence Act 1950 under the title "Facts which need not be proved.

[30] Section 57 of the Evidence Act then sets out the various facts or matters which the court shall take judicial notice of, as contained in sub-s. (1)(a)-(o) therein. As a quick example, sub-s. (1)(a) provides that "all laws or regulations having the force of law now or hereinbefore in force or hereafter to be in force in Malaysia or any part thereof;" shall be taken judicial notice of by the court. Subsection (1)(o) of s. 57 also stipulates that the court shall also take judicial notice of "all other matters which it is directed by any written law to notice."

[31] While s. 57 lists out facts or matters which the court is mandatorily obliged to take judicial notice of, s. 56 provides a legislative window through which the court may decide to judicially take notice of a fact or matter, for which no further proof needed to be adduced to establish its existence.

[32] In light of the statutory framework that exists pertaining to judicial notice, in our view, it would indeed be inimical if proof is required to be produced to establish a fact that the court has found to be one that is judicially noticed. Requiring proof to establish a fact that is judicially noticed clearly would not promote the concept. In fact, it would have the tendency to obstruct and limit the effective operation of the concept of judicial notice. The concept requires the court to take judicial notice of a fact and that fact usually would be a fact that is already rampantly available in the public domain. It would not be wrong for us to refer to such fact for its notoriety, for want of a better description. Again by way of example, the classic one would be the fact that the sun rises in the east and sets in the west, and that cats and dogs always will fight. By that, we mean that its existence is accepted. No proof of such fact needed to be adduced in court. The rampancy required needs not be eternal, but it should be sufficient to waive formal proof of its existence. It would suffice that such fact be stated and brought to the notice of the court before which the issues are germane for the court's due consideration. It is worth emphasising that the rampancy or notoriety surrounding the fact in question does not relate to its contents, but rather it refers to the factum of its existence as such. It is not concerned with the subjective acceptance of its contents but to the objective rampancy of its existence as a fact.

[33] Here, the facts to be judicially noted existed in the pleadings of the plaintiff, in particular in para. 33 of the plaintiff's reply to defence dated 7 June 2017 therein, which among others had stated as follows:

> f) Peguam Negara Malaysia dalam kenyataan Media bertarikh 26/1/2016 telah mengesahkan antara lain bahawa:
>
> (A) RM 2.6 Billion
>
> (1) Berhubung kertas siasatan berkaitan dana yang dikatakan berjumlah "RM2.6 billion" yang dimasukkan ke dalam akaun Plaintif, Peguam Negara Malaysia berpuashati bahawa keterangan saksi-saksi dan dokumen-dokumen sokongan yang dikemukakan oleh pihak SPRM kepadanya menunjukkan bahawa dana yang dimasukkan ke dalam akaun Plaintif berjumlah USD681 juta (RM2.08 bilion) di antara tarikh 22.03.2013 dan 10.04.2013 adalah merupakan sumbangan peribadi kepada Plaintif daripada keluarga diraja Arab Saudi dan telah diberikan kepada Plaintif tanpa apa-apa balasan.

A (2) Pihak SPRM sendiri di dalam siasatan telah menemui dan merakamkan percakapan saksi-saksi termasuk pemberi sumbangan tersebut yang mengesahkan sumbangan tersebut diberikan kepada Plaintif secara peribadi.

(3) Peguam Negara Malaysia berpuashati bahawa tiada keterangan yang menunjukkan bahawa dana tersebut adalah suatu bentuk
B suapan yang diberikan secara rasuah. Keterangan daripada siasatan tidak menunjukkan sumbangan dana tersebut diberikan sebagai dorongan atau sebagai upah untuk melakukan atau tidak melakukan sesuatu perbuatan yang berkaitan dengan kapasiti Plaintif sebagai seorang Perdana Menteri.

C (4) Tambahan pula, dalam bulan Ogos 2013, wang sejumlah USD620 juta (RM 2.03 bilion) telah dikembalikan semula oleh Plaintif kepada keluarga diraja Arab Saudi kerana dana tersebut tidak digunapakai.

(5) Berdasarkan keterangan saksi-saksi dan dokumen-dokumen sokongan yang dikemukakan, Peguam Negara Malaysia berpuashati
D bahawa tidak terzahir apa-apa kesalahan jenayah berhubung sumbangan dana RM2.08 bilion tersebut.

[34] We also had occasion to refer to the recent decision of this court in the case of *Santhi Krishnan v. Malaysia Building Society Bhd* [2015] 1 CLJ 1099. A paragraph on judicial notice in the judgment attributable to learned
E justice ldrus Harun JCA is worth repeating here. It is this. At p. 1100, in 'held (4)' therein, His Lordship had this to say:

> It is established law that matters for which the court may take judicial notice must be the subject of common and general knowledge and its existence is accepted by the public without qualification or contention.
F The test is whether sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof.

[35] The case of *Lee Chow Meng v. PP* [1975] 1 LNS 199; [1976] 1 MLJ 287 was cited with approval. In para. [25] of his speech, learned justice Idrus JCA went on to say that

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> "This is done upon the request of the party seeking to rely on the fact in issue. Facts which are admitted under judicial notice are accepted without any necessity to be formally proved by a witness." Suffice to say that we fully ascribe to the same.

[36] On the facts before the *Santhi Krishnan* case *(supra)* the bench of this
H court there had observed and ruled that:

> ... the certificate was only known to the Judge. There was nothing notorious about the certificate. Accordingly, the Judge had erroneously admitted the certificate in evidence when the doctrine of judicial notice clearly did not apply.

I

[37] But a different set of facts obtained in the present appeal. The findings by the Attorney-General and the SPRM were reported widely and the fact that they were in the public domain can never be disputed. The fact that such findings were therefore notorious also cannot, in all fairness, be entertained as a serious contention. We are of the considered view that judicial notice ought to be taken by this court of the fact that the Attorney-General of Malaysia had made a decision that the plaintiff had done no wrong in relation to the 1MDB issue. Such decision by the Attorney-General is, within the framework of our Federal Constitution, ie, art. 145, final. That fact had therefore been established without the need of further formal proof of the same by a witness. As alluded to earlier by us, to require any further formal proof would be entirely inimical in the circumstances, to say the least.

[38] As regards proof, it would suffice for us to state that the plaintiff had succeeded in discharging the burden required of him in order to be granted the interim injunction against the defendant pending the disposal of the defamation suit brought by the plaintiff against the defendant. To our minds, the fact that the plaintiff had stated that there are triable issues does not invite any adverse comment as in the context of a defamation suit, there are obvious disputable facts that are suitably posed for full ventilation in an *viva voce* hearing with witnesses examined on the stand for veracity.

[39] On the examination of the defendant's defence, it is manifestly clear that the defendant was not the maker of the documents exhibited in exhs. "TP2" (18 articles) and "TP3" (three articles) of the defendant's affidavit in reply no. 1 (in opposing plaintiff's injunction application – encl. 4) affirmed on 15 May 2017. As such, "TP2" and "TP3" are hearsay evidence that were not within the personal knowledge of the defendant. However, as we alluded to earlier there should be no finding in this appeal on the merits of the plaintiff's claim. We noted that this is not a striking out application. Despite that, we are in full agreement with the submission of learned counsel for the plaintiff that the whole issues of 1MDB have been scrutinised and investigated by the PAC appointed by Parliament. The investigations were also carried out by the Malaysian Anti-Corruption Commission (MACC), Royal Malaysian Police (RMP), Bank Negara (BNM) and the Attorney-General Chambers (AGC), the result of which has been disclosed to the public by the AGC in that the plaintiff had done no wrong in relation to the 1MDB allegation.

[40] The defendant had also raised qualified privilege as a defence. Suffice for us to say, not all defamatory statements published in the name of fulfilling public need for information, would invariably attract the defence of qualified privilege, especially in the context of journalistic reporting. In the case of *Jameel v. Wall Street Journal* [2006] 4 All ER 1279 (HL), Lord Bingham of Cornhill had occasion to state that there was no duty on the part of the public to receive misinformation, much less those laced with defamatory undertones. At para. [32] of His Lordship's speech, he had stated:

A [32] Qualified privilege as a live issue only arises where a statement is defamatory and untrue. It was in this context, and assuming the matter to be one of public interest, that Lord Nicolls proposed ([1999] 4 All ER 609 at 623, [2011] 2 AC 127 at 202) a test of responsible journalism, a test repeated in *Bonnick v. Morris* [2002] UKPC 31 at [22]-[24], (2002) 12 BHRC 558 at [22]-[24], [2003] 1 AC 300. The rationale of this test is, as I B understand, that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify. As Lord Hobhouse observed with characteristic pungency ([1999] 4 All ER 609 at 657, [2001] 2 AC 127 at 238), 'No public interest is served by publishing or communicating misinformation'. But the publisher is protected if he has taken such steps as a responsible journalist C would take to try and ensure that what is published is accurate and fit for publication.

[41] As for fair comment, the law on the defence of fair comment amounts to this. If a defendant can prove that the defamatory statement is an expression of opinion on a matter of public interest and not a statement of D fact, he or she can rely on the defence of fair comment. The courts have said that whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on or what may happen to them or to others, then it is a matter of public interest on which everyone is entitled to make fair comment. It is also a requirement that the E comment must be based on true facts which are either contained in the publication or are sufficiently referred to. It is for the defendant to prove that the underlying facts are true. If he or she is unable to do so, then the defence will fail. As with justification, the defendant does not have to prove the truth of every fact provided the comment was fair in relation to those facts which F are proved. However, 'fair' in this context, does not mean reasonable, but rather, it signifies the absence of malice. The views expressed can be exaggerated, obstinate or prejudiced, provided they are honestly held. (See, the case of *Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor* [2014] 3 CLJ 560.)

G **[42]** The Supreme Court in *The New Straits Times Press (M) Bhd v. AirAsia Bhd. (supra)* further held that an interlocutory injunction will not be granted against the defendant unless the plaintiff can show that the defence will not succeed:

H (1) There was no reason to depart from the general rule that an interlocutory injunction will not be granted against a defendant in a libel action if he intends to plead justification unless the plaintiff can prove that the statement is untrue ...

[43] Premised on the above, we are of the considered view that on the evidence adduced so far, the defendant's defences of justification, qualified I privilege, and fair comment are bound to fail.

Conclusion

[44] We are mindful that the court ought to be very cautious in granting interim injunction to restrain publication of an alleged defamatory statement. But there is no total bar from granting an interim injunction in a defamation case. On the whole of circumstances of this case, we are satisfied that this is a proper case where such application for interim injunction should be granted. We are of the view that the learned judge had not erred in fact or in law in exercising the court's discretion in favour of allowing of injunction against the defendant. The reason being that the defences set up by the defendant could not, in the light of the evidence, especially the AG's decision, succeed. We, therefore, see no merit in the appeal.

[45] We therefore would affirm the decision of the High Court dated 4 August 2017. The defendant's appeal is unanimously dismissed with costs in the cause. We also order the deposit to be refunded to the defendant.